

Supreme Court, U. S.
FILED

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MICHAEL ROBAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. **74-1601**

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG
LINES DEPARTMENT,

Petitioner,

v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
ESTHER SKIPPER, INDIVIDUALLY AND ON BEHALF OF
ALL SIMILARLY SITUATED NON-SUPERVISORY FE-
MALE EMPLOYEES OF AMERICAN TELEPHONE AND
TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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New York, New York 10013

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Attorneys for Petitioner

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v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

American Telephone and Telegraph Company, Long
Lines Department, petitions for a writ of certiorari to
review the judgment of the United States Court of
Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the district court (Appendix A, *in-
fra*, pp. 1a-11a) is reported at 379 F. Supp. 679. The

opinion of the court of appeals (Appendix B, *infra*, pp. 13a-28a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1975 (Appendix C, *infra*, pp. 29a-30a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer's exclusion of normal pregnancy from coverage under an employee disability income protection plan constitutes sex discrimination proscribed by Title VII of the Civil Rights Act of 1964.

STATUTE INVOLVED

The pertinent portion of Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2(a)(1), provides as follows:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

STATEMENT

This case presents the same significant question in the administration of Title VII of the Civil Rights Act of 1964, as *Liberty Mutual Insurance Company v. Wetzel*, 511 F.2d 199 (3d Cir. 1975), in which this Court, less than a month ago, granted certiorari (No. 74-1245, May 27, 1975). The question is whether the

exclusion of normal pregnancy from coverage under a private employer's disability benefits plan constitutes sex discrimination under Title VII. Although the Court held last year in *Geduldig v. Aiello*, 417 U.S. 484 (1974), that the identical exclusion in a state-administered disability benefits plan did not constitute discrimination based on sex, it has not expressly stated that its holding is applicable under Title VII as well.

American Telephone and Telegraph Company, Long Lines Department, ("Long Lines") is an operating department of A.T.&T. with offices throughout the country, engaged in the business of providing interstate communications services to the public. Long Lines has a disability benefits plan which provides benefits to active employees who become temporarily disabled to work by reason of non-occupational sickness and injury. Long Lines' plan covers absences resulting from disabling complications of pregnancy and abnormal pregnancies, but, like the plan in *Liberty Mutual*, not absences attributable to normal pregnancy and childbirth.¹

In 1972, respondents filed charges with the Equal Employment Opportunity Commission ("EEOC"), claiming that Long Lines' failure to cover absences due to normal pregnancy and childbirth constituted discrimination based on sex in violation of Title VII. After receipt of the requisite right to sue letter from EEOC, respondents brought this class action in the district court.

¹ While the plans in *Liberty Mutual* and here both exclude normal pregnancy from coverage, the plan in *Liberty Mutual* also excludes complications of pregnancy and abnormal pregnancy.

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4905

While the suit was pending there, this Court decided *Geduldig v. Aiello*. The district court thereupon invited briefs and heard argument on the question whether it should dismiss the complaint *sua sponte* in light of *Aiello*. It held that *Aiello* had established that the exclusion of normal pregnancy from coverage under a disability benefits plan does not constitute discrimination based on sex under Title VII, unless the exclusion is a mere pretext to effect invidious discrimination against women. On this ground, it dismissed the complaint; granted respondents leave to replead the issue whether Long Lines' exclusion was a mere pretext for invidious discrimination; and certified to the court of appeals, pursuant to 28 U.S.C. 1292(b), the question whether its reading of *Aiello* was correct. The court of appeals held that the district court's reading was incorrect, and accordingly reversed.

REASONS FOR GRANTING THE WRIT

1. This case and *Liberty Mutual*, involving the same basic question, raise a pervasive issue of fundamental importance in the administration of Title VII. The issue has arisen not only in the Third Circuit in *Liberty Mutual* and the Second Circuit here, but also in the Fourth, Sixth and Ninth Circuits,² and in numerous district courts.³ Uncertainty now abounds as

² *General Electric Co. v. Gilbert*, No. 74-1557, 4th Cir., *appeal docketed* May 15, 1974; *Satty v. Nashville Gas Co.*, No. 75-1083, 6th Cir., *appeal docketed* January 23, 1975; *Hutchison v. Lake Oswego School District*, No. 74-3181, 9th Cir., *appeal docketed* November 18, 1974.

³ *See, e.g.*, *Satty v. Nashville Gas Co.*, 384 F. Supp. 765 (D.C. Tenn. 1974); *Vineyard v. Hollister School District*, 8 FEP Cases 1009 (D.C. Cal. 1974); *Zichy v. City of Philadelphia*, 10 FEP Cases 853 (D.C. Penn. 1975); *Sale v. Waverly-Shell Rock Bd. of*

to whether, under a disability benefits plan, an employer discriminates by distinguishing between absences due to normal pregnancy and those attributable to temporary disabilities unrelated to pregnancy. For this reason alone, review by this Court is appropriate.

2. Such review is appropriate also because the decision below conflicts in principle with this Court's decision in *Aiello*. The Court there held that the Equal Protection Clause of the Fourteenth Amendment did not require California to cover absences due to normal pregnancy under a state-administered disability benefits plan. In reaching this conclusion, the Court explicitly stated that the exclusion of pregnancy did not constitute discrimination on the basis of sex, observing (417 U.S. at 496-497) that "[t]here is no risk from which men are protected and women are not." And the Court added (417 U.S. at 496 n.20): "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second group includes members of both sexes."

It is thus apparent that the decision in *Aiello* cannot be dismissed—as the court below would dismiss it

Educ., 9 FEP Cases 138 (D.C. Iowa 1975); *CWA v. Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill., Filed April 13, 1973); *CWA v. Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga., Filed May 17, 1973); *CWA v. New York Tel. Co.*, C.A. No. 73-3352 (S.D.N.Y., Filed July 31, 1973); *CWA v. The Pacific Tel. & Tel. Co.*, C.A. No. C-73-1739 RFP (N.D. Cal., Filed Sept. 28, 1973); *CWA v. South Central Bell Tel. Co.*, C.A. No. 73-1771 Section A (E.D. La., Filed July 5, 1973).

—as simply one in which this Court found discrimination based on sex, but held that the discrimination passed constitutional muster because it was justifiable under traditional Fourteenth Amendment standards. The Court went further than that in *Aiello*. It concluded in unmistakable terms that the exclusion of normal pregnancy from a disability benefits plan does not constitute sex-based discrimination—a conclusion which is as valid under Title VII as under the Fourteenth Amendment. The court below and the Third Circuit in *Liberty Mutual* have concluded otherwise, holding that such an exclusion does constitute sex-based discrimination for purposes of Title VII. The conflict is patent. It is ripe for resolution at this time, as the Court has already recognized by granting certiorari in *Liberty Mutual*.

3. There are no distinctions between *Liberty Mutual* and this case that would justify a difference in the treatment of the two petitions. The cases arise under the same statute and in the same context, and present the same basic issue. Furthermore, the reasoning of the two courts also is identical in all significant aspects.

Thus, the Third Circuit in *Liberty Mutual* sought to differentiate *Aiello* principally on the basis (511 F.2d at 203) that “our case is one of statutory interpretation rather than one of constitutional analysis.” In like fashion, the court below embraced the same purported distinction, stating (Appendix B, *infra*, p. 26a), “Here the issue is one of statutory interpretation, not one of constitutional analysis as in *Aiello*.”

Both the Second and Third Circuits also sought to justify the results they reached by relying on EEOC Guidelines (29 C.F.R. § 1604.10(b)) to the effect that

the exclusion of normal pregnancy from a disability plan constitutes sex-based discrimination in violation of Title VII. We need only point out that these Guidelines were issued before this Court declared in *Aiello* (417 U.S. at 496-497 n.20) that the exclusion of normal pregnancy is not sex discrimination “[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other * * *.”

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the Court should hold the petition pending the ultimate disposition of *Liberty Mutual*.

Respectfully submitted,

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June 1975

APPENDIX

UNITED STATES DISTRICT COURT, S. D. NEW YORK,
CIVIL DIVISION

July 30, 1974.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER
SKIPPER, Individually and on Behalf of All Similarly
Situating Non-Supervisory Female Employees of
American Telephone and Telegraph Company, Long
Lines Department, *Plaintiffs*

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES
DEPARTMENT, *Defendants*.

WOMEN IN CITY GOVERNMENT UNITED, ET AL., *Plaintiffs*,

v.

THE CITY OF NEW YORK ET AL., *Defendants*.

Nos. 73 Civ. 3353, 74 Civ. 304

Actions against employers for violation of Civil Rights Act proscription against discrimination on basis of sex. The District Court, Whitman Knapp, J., held that where complaints alleging discrimination against pregnant employees on basis of sex were drawn to invoke law declared in a prior district court decision to effect that pregnancy-related disparity in and of itself (even if not invidious) constitutes sex discrimination, but complaint could be read as broad enough to permit proof of invidious discrimination that would justify relief under either Fourteenth Amendment or Civil Rights Act and prior decision had been reversed by the Supreme Court, complaint would be dismissed, with leave to replead, and question of application of the Supreme Court reversal to instant cases would be certified to the Court of Appeals.

Order accordingly.

1. Civil Rights

Supreme Court's ruling under equal protection clause of the Constitution that distinctions based on pregnancy do not constitute discrimination because of sex (or gender) requires dismissal of complaints alleging that discrimination against pregnant employees with respect to medical benefits violated Title VII of the Civil Rights Act of 1964. U.S. C.A.Const. Amend. 14; Civil Rights Act of 1964, 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1); 28 U.S.C.A. § 1292(b).

2. Courts

Federal Civil Procedure

Where complaints alleging violation of Civil Rights Act proscription against discrimination against pregnant employee on basis of sex were drawn to invoke law declared in a prior decision to effect that pregnancy-related disparity in and of itself constitutes sex discrimination, but complaint could be read as broad enough to permit proof of invidious discrimination that would justify relief under either Fourteenth Amendment or Civil Rights Act and prior decision had been reversed by the Supreme Court, complaint would be dismissed, with leave to replead, and question of application of Supreme Court reversal to instant cases would be certified to the Court of Appeals. U.S.C.A.Const. Amend. 14; Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1); 28 U.S.C.A. § 1292(b).

Cohn, Glickstein, Lurie, Ostrin & Lubell, New York City, Kane & Koons, Washington, D. C., for plaintiffs Communications Workers et al. by Mary K. O'Melveny, Jonathan W. Lubell, New York City, Barbara Schain, Law Student, of counsel.

Steptoe & Johnson, Washington, D. C., Jim C. Kilpatrick, New York City, for defendant American Tel. & Tel. Co., Long Lines Dept. by Thompson Powers, James D. Hutchinson, Kenneth I. Jonson, Washington, D. C., of counsel.

Linda Colvard Dorian, Washington, D. C., Office of the Gen. Counsel, Equal Employment Opportunity Commission, amicus curiae.

Rabinowitz, Boudin & Standard, New York City, for plaintiffs Women in City Government United et al. by K. Randlett Walster, New York City, of counsel.

Mirkin, Barre, Saltzstein & Gordon, P. C., Great Neck, N. Y., for defendants Social Service Employees Union Local 371 and Social Service Employees Union Local 371 Welfare Fund by Gerald J. Barre, Stephen F. Gordon, Jeffrey S. Dubin, Great Neck, N. Y., of counsel.

Adrian P. Burke, Corp. Counsel, New York City, for defendants City of New York et al. by David W. Fisher, New York City, Charles W. Segal, Kew Gardens Hills, N. Y., of counsel.

Breed, Abbott & Morgan, New York City, for Blue Cross and Blue Shield of Greater New York by Donald B. da Parma, Elliott Abrams, New York City, of counsel.

Trubin, Sillocks, Edelman & Knapp, New York City for Group Health Inc. by Ross Sandler, Joseph A. Klein, New York City, of counsel.

Julius Topol, New York City, for D.C. 37 and D.C. 37 Health and Security Plan.

Delson & Gordon, New York City, for defendants United Federation of Teachers and United Federation of Teachers Welfare Fund.

Edward L. Johnson, New York City, for defendant New York City Housing Authority.

OPINION

WHITMAN KNAPP, District Judge.

The complaints in these unrelated class actions make quite similar allegations. They each allege inter alia that the several defendants have, in the treatment of pregnant employees, violated the proscription against discrimination on the basis of sex contained in Title VII of the Civil Rights Act of 1964.

Paragraph 7 of the CWA complaint alleges in part:

“the defendant has promulgated and maintained policies * * * which limit the employment opportunities of its female employees because of sex by failing and refusing to provide equal rights, benefits and privileges to females under temporary disability due to pregnancy or childbirth or complications arising therefrom, as are made available to its male employees under temporary disability.”

Paragraph 51 of the WICGU complaint (plaintiffs' first cause of action) alleges:

“Defendants * * * have * * * discriminated against the plaintiffs in this action in the terms and conditions of employment because of sex, in that the health and hospitalization insurance plans negotiated and approved by defendant * * * offer substantially fewer benefits for pregnancy and pregnancy-related conditions than for other medical and surgical problems requiring hospital and medical care.”

The remaining ten causes of action alleged in the WICGU complaint may fairly be characterized as variations on the theme of paragraph 51, the differences being in the particular defendant named and the type of policy attacked—health and hospitalization insurance or disability benefit.

Motions were argued before me in both cases on May 21, 1974. In CWA the motions concerned class action treat-

ment. In WICGU the major motion had to do with exhaustion of Title VII remedies.

While those motions were sub judice, the Supreme Court decided *Geduldig v. Aiello*, — U.S. —, 94 S.Ct. 2485, 41 L.Ed.2d —. We then scheduled argument as to whether in light of *Aiello*—especially footnote 20 of the opinion—this court should *sua sponte* dismiss the complaints in these actions. Having received briefs and heard argument, we so dismiss the complaints with leave to replead, and certify a question to the Court of Appeals.

In *Aiello* the Supreme Court held that California's disability insurance plan which excludes normal pregnancy from coverage does not violate the Equal Protection Clause of the Fourteenth Amendment. Thus, inter alia, the Court observed — U.S. at —, 94 S.Ct. at 2491):

“We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups who are eligible for disability insurance protection under the program.”

The Court found legitimate and “wholly non-invidious” California's reasons for not wanting a more comprehensive program—the state's desire to keep the contribution rate low, to keep the program self-supporting, and to provide adequate benefits for some disabilities rather than inadequate benefits for all (*id.*). The Court further found “no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class * * *.” (*id.*)

The footnote (footnote 20) to the sentence just quoted provides—in our view—the key to the Court's decision. It flatly states that distinctions involving pregnancy do not constitute discrimination because of sex (or gender). In the first paragraph of that footnote the Court, in answer

to arguments presented by the dissenting justices, observed:

"The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225, and *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretext designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."

In the second paragraph, the Court synthesized its position:

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes."

At oral argument in the case at bar, counsel for both sets of plaintiffs and counsel for the EEOC as amicus curiae, insistently argued that *Aiello* is distinguishable on many grounds. The most significant distinction was

said to be that the instant cases involve disparate treatment by employers—private as well as municipal—of pregnant employees, while *Aiello* involved a social welfare policy created by state legislation. While deference is to be shown to legislative judgments on social welfare matters, the argument goes, no such deference to allegedly discriminatory employers is warranted under Title VII.

The flaw in this argument is that it begs the question. The threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities can be classified as discrimination because of sex (or gender). If, as footnote 20 seems to suggest, it cannot be so classified, then the further question of whether such disparity is justified—or less justifiable in the employment context than in some other context—can never be reached.

In other words, if the *Aiello* Court had found that the California scheme did discriminate on the grounds of sex (or gender) but must nevertheless be upheld because of the deference due to California's sovereign right to make choices in methods of providing social welfare, the holding would clearly be inapplicable to a case arising under Title VII where no such deference is required. But such, as we read it, was not the holding of the Court. The holding was that California's treatment of pregnancy related disabilities did not in and of itself constitute a discrimination based on sex (or gender). Such a holding precludes relief under Title VII even more clearly than under the Fourteenth Amendment. Under the Amendment it would be open to pregnant women to argue that it was irrational to single them out as a class even if the singling out were not sex related. No such argument is open under Title VII, which deals only with discrimination "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1).

[1] Plaintiffs get scant help from the cases they cite for the proposition that discrimination on grounds of sex (or gender) means something different when the Four-

teenth Amendment is involved than when Title VII comes into play. The cases cited for that proposition are in our view more readily explained by the respective dates of decision than by the rubric under which they were decided. Thus, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, upholding protective legislation, was decided in 1937, while *Weeks v. Southern Bell Telephone* (5th Cir.) 467 F.2d 95, which ruled the opposite way, was decided in 1972. Similarly, *Goesart v. Cleary*, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163, was decided in 1948. It seems a safe guess that, in light of *Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583, *Phillips v. Martin Marietta Corp.* (1971) 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613, and *Sprogis v. United Air Lines* (7th Cir. 1971) 444 F.2d 1194, cert. den. 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543, both *West Coast Hotel* and *Goesart* would be decided differently today. In brief, *Aiello* does not represent a retreat from the Court's modern view as to discrimination on grounds of sex (or gender), but—as footnote 20 plainly indicates—a finding that disparity of treatment based on pregnancy does not in and of itself constitute such discrimination.¹

[2] Having come to this conclusion as to the effect of *Aiello*, the question arises as to what should be done with these lawsuits at this stage of the proceedings. A review of the complaints makes two things plain. *First*, both complaints were obviously drawn for the purpose of invoking

¹ By way of illustrating the Court's point, a woman's organization (e. g. a woman's club or actresses' workshop) could hardly be taxed with discriminating on grounds of sex (or gender) if its medical insurance policies provided no coverage for pregnancy-related disabilities. However such disparity of treatment of pregnant persons (who, not necessarily relevant so far as concerns the Amendment, happened to be women) might well run afoul of the equal protection demands of the Fourteenth Amendment, if it could be shown to involve state action and not to be economically or otherwise justifiable.

the law as declared by the *Aiello* District Court (before it was reversed) to the effect that pregnancy-related disparity "in and of itself" constituted discrimination on grounds of sex (or gender). *Second*, if principles of "notice pleading" were to be applied, both complaints could be read as broad enough to permit proof of the type of "invidious discrimination" that would justify relief under either the Fourteenth Amendment or Title VII.

Any one of three courses of actions would therefore seem possible:

- (1) The complaints could be construed under the principles of notice pleading and the parties be allowed to proceed to trial, with the result that the question of the correctness of our interpretation of *Aiello* could be presented to the Court of Appeals on a full trial record.
- (2) The complaints could be construed—as the plaintiffs originally intended—to invoke the pre-*Aiello* law that disparity with respect to pregnancy-related disabilities in and of itself constituted discrimination on grounds of sex (or gender), and dismissed without leave to replead, thus giving plaintiffs an appeal as of right to the Court of Appeals.
- (3) The complaints could be so construed but dismissed with leave to replead, and the question of *Aiello's* application to the cases at bar certified to the Court of Appeals.

Upon reflection, only the third of these possible courses of action seems appropriate.

If the first possible course were followed, the plaintiffs would be in almost an impossible position of having to wage a "two front war," designed to present the Court of Appeals with a record calculated to take advantage of pre-*Aiello* law that pregnancy-related disparity in and of itself established a *prima facie* case under Title VII and designed at the same time to establish a fall back posi-

tion that the particular practices pursued by these defendants—or some of them—were “invidious” and therefore in violation both of Title VII and of the Fourteenth Amendment. It goes without saying that the methods of proof appropriate to these two possible positions are quite disparate.

Moreover, oral argument on the problems presented by *Aiello* was devoted in large part to trying to ascertain how, if at all, the Court of Appeals could benefit by having the *Aiello* question presented to it on a full trial record. Counsel for both sets of plaintiffs and for EEOC as amicus curiae—although exhibiting the advocate’s customary reluctance to yield a point—finally conceded that months of pre-trial discovery and weeks of trial would produce no new information which would assist the Court of Appeals in determining what effect, if any, *Aiello* should have on these lawsuits.

Finally, absent an authoritative determination of *Aiello*’s effect, it would be almost impossible to define the parameters of the appropriate classes and subclasses. Plaintiffs, in each case, ask in effect for a class including all women of child bearing age. If our interpretation of *Aiello* be correct it would seem that the class in each suit would have to be confined to women presently pregnant plus those who had actually been denied pregnancy benefits. On the other hand if *Aiello* be inapplicable, the class might well be much more extensive.

The second possible course (dismissal without leave to replead) would present the Court of Appeals with several basically irrelevant questions, such as whether or not plaintiffs had been fairly treated in having their complaints so narrowly construed without an opportunity to replead. Moreover, should the Court affirm the dismissal, plaintiffs might be saddled with wholly unnecessary statute of limitations problems if they then attempted to obtain re-

lief on the theory that defendants, or any of them, had engaged in “invidious” conduct.

We shall therefore follow the third possible course and certify to the Court of Appeals pursuant to 28 U.S.C. § 1292(b) the question whether *Aiello* has established—for the purposes of these actions or either of them—that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment.

We believe that this opinion has demonstrated—and we so certify—that this question is controlling, and one as to which “there is substantial ground for difference of opinion”, and that its resolution would “materially advance the ultimate termination of the litigation”.

So ordered.

U.S. COURT OF APPEALS, SECOND CIRCUIT (NEW YORK)

COMMUNICATIONS WORKERS v. A T & T Co.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ET AL. v.
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES
DEPARTMENT, NO. 74-2191, MARCH 26, 1975

CIVIL RIGHTS ACT OF 1964

**Sex discrimination — Pregnancy — Sickness and
disability benefits**

U.S. Supreme Court's decision in *Geduldig v. Aiello* (8 FEP Cases 97) upholding constitutionality of California's exclusion of disability due to normal pregnancy from its statutory disability insurance program does not require dismissal of Title VII action challenging employer's failure to provide sickness and disability benefits in connection with absences due to pregnancy, notwithstanding footnote in *Geduldig* decision stating that in absence of showing that distinctions involving pregnancy are mere pretexts designed to discriminate invidiously, "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis." (1) Footnote concerns equal protection standards of judicial scrutiny applicable to California's legislative classification of pregnancy; (2) footnote makes no reference to Title VII or to EEOC guidelines that prohibit disparate treatment of pregnancy disabilities, and it is inconceivable that Supreme Court would circumscribe reach of Title VII and invalidate guidelines without mentioning them; (3) issue in present case is one of statutory interpretation, not one of constitutional analysis.

Appeal from the U.S. District Court for the Southern District of New York (8 FEP Cases 529, 379 F.Supp. 679).
Reversed and remanded.

Mary K. O'Melveny, New York, N.Y. (Cohn, Glickstein, Lurie, Ostrin & Lubell, Jonathan W. Lubell and H. Howard Ostrin, New York, N.Y., of counsel; Kane & Koons, Charles V. Koons, Washington, D.C., of counsel), for appellants.

Thompson Powers, Washington, D.C. (Steptoe & Johnson, James D. Hutchinson and Kenneth I. Jonson, Washington, D.C., of counsel; Harold S. Levy and Jim G. Kilpatrick, New York, N.Y.), for appellee.

Linda Colvard Dorian (William A. Carey, General Counsel, Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, and Charles L. Reischel, of counsel), for EEOC, amicus curiae.

Gordon Dean Booth, Jr. Atlanta, Ga., and Troutman, Sanders, Lockerman and Ashmore (Robert N. Meals, Jr., of counsel), Atlanta, Ga. filed brief urging affirmance for Alaska Airlines, Inc., et al., amici curiae.

Winn Newman, Ruth Weyand, Marcia D. Greenberger, Joseph N. Onck, and Lois J. Schiffer, Washington, D.C., and Irving Abramson, Stephen C. Vladeck, Frank J. Donner, James G. Maura, Jr., and Robert Z. Lewis, New York, N.Y., filed brief urging reversal for International Union of Electrical, Radio and Machine Workers, et al., amici curiae.

Eve Cary, Ruth Bader Ginsburg, Melvin L. Wulf, Kathleen Peratis, and Wendy Webster Williams, New York, N.Y., filed brief urging reversal for New York Civil Liberties Union, amicus curiae.

Bellamy Blank Goodman Kelly & Stanley (Mary F. Kelly and Nancy E. Stanley, of counsel), New York, N.Y., filed brief urging reversal.

Henry Spitz and Ann Thacher Anderson, New York, N.Y., filed brief urging reversal for New York State Division of Human Rights, amicus curiae.

Before FEINBERG and MULLIGAN, *Circuit Judges*, and BRYAN, *District Judge*.*

Full Text of Opinion

FREDERICK van PELT BRYAN, Senior District Judge:—This is an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from an order of the United States District Court for the Southern District of New York (Whitman Knapp, J.) which dismissed the complaint in this action with leave to replead and certified a question to this Court. This Court has allowed the appeal on the question so certified.

The suit, commenced on July 31, 1973, is a class action brought by plaintiffs-appellants Communications Workers of America, AFL-CIO (CWA) and Esther Skipper, under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000-e et seq.¹ The complaint alleges that the Long Lines Department of defendant-appellee American Telephone & Telegraph Company (Long Lines) violated Title VII, which prohibits discrimination in employment or between employees on the basis of sex.

The allegations of the complaint as to specific policies and practices of Long Lines claimed to be violative of Title VII are obviously based on guidelines issued by the Equal Employment Opportunity Commission (EEOC), which is

* Frederick P. Bryan, of the Southern District of New York, sitting by designation.

¹ 42 U.S.C. § 2000e-2(a) (1) provides, in relevant part:

“(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.”

the federal agency charged with enforcement of the Act. These guidelines were designed to prohibit disparity of treatment between pregnancy and other disabilities in the employment context. See 29 C.F.R. 1604.10(b)² The complaint alleges that Long Lines "has promulgated and maintained policies, practices, customs and usages which limit the employment opportunities of its female employees because of sex by failing and refusing to provide equal rights, benefits and privileges to females under temporary disability due to pregnancy or childbirth or complications arising therefrom, as are made available to its male employees under temporary disability. [Long Lines'] discriminatory practices and policies involve matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payments under health or disability insurance or sick leave plans. . . ."

Declaratory, injunctive and monetary relief is sought on behalf of all non-supervisory female employees and former female employees of Long Lines, who have been or may be effected by the policies and practices complained of.³

² 29 C.F.R. § 1604.10(b) provides:

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

³ The complaint also contains appropriate jurisdictional allegations that a complaint was duly filed with the EEOC which gave the required notice of the right to sue.

The answer admits that under the Long Lines disability benefit plans, sickness and disability benefits are not paid in connection with absences arising on account of "certain conditions attendant to pregnancy, childbirth, or child rearing," but denies that Long Lines' policies and practices constitute sex discrimination in violation of Title VII. The answer includes among other defenses, a separate defense that any alleged discrimination on the basis of sex arising from failure to include absences relating to pregnancy, childbirth or child rearing in Long Lines' disability plans "is based upon a rational and neutral business justification" under Title VII.⁴

Prior to the dismissal of the complaint below, both sides had conducted a substantial amount of pre-trial discovery. Discovery had not been completed, however, and as yet no depositions have been taken. A motion concerning class action treatment was pending before the district court.

On June 17, 1974, while that motion was *sub judice*, the Supreme Court decided *Geduldig v. Aiello*, 417 U.S. 484, 8 FEP Cases 97 (1974), holding that the provisions of a California statutory state-administered system of disability insurance for private employees which excluded from coverage disabilities arising from normal pregnancy did not violate the Equal Protection Clause of the Fourteenth Amendment.

The district court, in the case at bar, then requested briefs and heard argument on the question of whether the complaint under Title VII should not be dismissed *sua sponte* in the light of *Aiello*.

The opinion of the district court which followed read the majority opinion in *Aiello*, and particularly footnote 20 of

⁴ The answer also pleads a counterclaim based on collective bargaining agreements between CWA and AT&T, to which CWA has replied denying liability. The counterclaim is irrelevant to this appeal.

that opinion (417 U.S. at 496, 8 FEP Cases at 101-102), as “flatly” holding that disparity of treatment between pregnancy-related and other disabilities cannot be classified as sex discrimination under either the Equal Protection Clause or Title VII, absent a showing that such disparity was a mere pretext designed to effect invidious discrimination against the female sex. It concluded that Aiello was decisive of the issues raised by the complaint in this case and that therefore as a matter of law the complaint failed to state a claim on which relief could be granted under Title VII.⁵ The district court dismissed the complaint solely on that ground, with leave to replead,⁶ and certified the following question to this court pursuant to 28 U.S.C. § 1292(b):⁷

⁵ The district court did not refer to and apparently did not consider any of the factual material obtained through the incomplete discovery conducted by the parties and included in the record on appeal. Though the briefs of the parties and of *amicus curiae* make extended references to such material, it is not relevant on this appeal, which is concerned only with the district court’s holding that the complaint on its face was insufficient as a matter of law.

⁶ Acknowledging that “if principles of ‘notice pleading’ were to be applied [the complaint] could be read as broad enough to permit proof of the type of ‘invidious discrimination’ that would justify relief under either the 14th Amendment or Title VII,” the opinion nevertheless construed the complaint as alleging “that disparity with respect to pregnancy-related disabilities in and of itself constituted discrimination on grounds of sex (or gender)” Apparently, leave to replead was granted to permit plaintiffs to assert a claim that the Long Lines policies and practices were mere pretexts designed to effect invidious discrimination against members of the female sex.

⁷ At the same time as the question of *sua sponte* dismissal was argued in the case at bar, the district court also heard argument on the same question in *Women in City Government United, et al. v. The City of New York, et al.*, 74 Civ. 304 (S.D.N.Y.). The complaint in that case alleged that a health and hospitalization plan which offered fewer benefits for pregnancy-related conditions

“ . . . whether Aiello has established—for purposes of [this action]—that disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition either of Title VII or of the Fourteenth Amendment.”⁸

We think that the question certified does not adequately pose the issue on this appeal. In essence, what the court below held was that Aiello established that the disparity of treatment of pregnancy-related disabilities alleged in the complaint *cannot* constitute discrimination under Title VII unless it is alleged and proved to be a mere pretext designed to effect invidious discrimination against the female sex. The real question posed here is whether Aiello required dismissal of the complaint in this action as a matter of law for failure to state a claim on which relief could be granted under Title VII. That narrow question is the sole question to which we address ourselves.

than for other medical and surgical problems violated both Title VII and the Equal Protection Clause. The opinion of the district court treated both cases together and reached the same conclusion and certified the same question pursuant to Section 1292(b) in both. In the *Women United* case, however, permission to appeal on the question so certified was denied by the Court of Appeals and the case was remanded to the district court on October 2, 1974. The district court then dismissed the complaint in that action with prejudice. An appeal is presently pending in this court (#74-2352) from that order. A motion to consolidate that appeal with the interlocutory appeal in the case at bar was denied on October 23, 1974. The appeal has not as yet been heard in this Court.

⁸ We assume that the Fourteenth Amendment was included in the certified question because the companion action, *Women in City Government United et al., v. The City of New York, et al.*, decided at the same time, charged violation of both the Equal Protection Clause and Title VII. See n. 7, *supra*. There is no claim of violation of the Equal Protection Clause in the case at bar and we do not pass on any Equal Protection question.

We disagree with the district court's reading of Aiello. In our view, Aiello is not decisive of the issues raised by this complaint under Title VII and the court below was in error in holding that Aiello required dismissal of the complaint as a matter of law.

At the outset of the discussion, it is well to bear in mind the admonition of Chief Justice Marshall in *Cohen v. Virginia*, 6 Wheaton (19 U.S. 264, 399-400 (1821)):

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Chief Justice Marshall's admonition has been repeated many times since. For example, in *Armour & Co. v. Wantoek*, 323 U.S. 126, 132-133 (1944), rehearing denied, 323 U.S. 818 (1945), Mr. Justice Jackson, writing for a unanimous court, stated:

"It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

See also *Humphrey's Executor v. United States*, 295 U.S. 602, 626 (1935); *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 404 (1965); *United States v. Neifert-White Co.*, 390 U.S. 228, 231 (1968); *Cameron v.*

Mullen, 387 F.2d 193 (D.C. Cir. 1967); *Irwin v. Simmons*, 140 F.2d 558 (2d Cir. 1944); *NLRB v. Cities Service Oil Co.*, 129 F.2d 933, 10 LRRM 787 (2d Cir. 1942); *Commissioner of Internal Revenue v. Marshall*, 125 F.2d 943 (2d Cir. 1942).

These cautions apply with particular emphasis to footnotes or other "marginalia" in Supreme Court opinions, which should be read "within the context of the holding of the Court and the text to which it is appended," *Harkless v. Sweeney Independent School District*, 427 F.2d 319, 322, 2 FEP Cases 926, 928 (5th Cir. 1970), cert. denied, 400 U.S. 991, 3 FEP Cases 30 (1971). See also *John Hancock Mutual Life Insurance Company v. Bartels*, 308 U.S. 180, 184 (1939). In view of the wide differences between Aiello and the case at bar, these warnings are particularly apposite here.

Aiello involved a challenge under the Equal Protection Clause to a provision of the California Unemployment Insurance Code which excluded disabilities due to normal pregnancy from coverage under a state-administered disability insurance program for private employees. A three-judge court below with one judge dissenting, found that the exclusion of pregnancy-related disabilities from coverage under the California insurance program "is not based on a classification having a rational and substantial relationship to a legitimate state purpose" and therefore held that the challenged provisions of the statute violated the Equal Protection Clause and were constitutionally invalid. *Aiello v. Hansen*, 359 F.Supp. 792, 801, 7 FEP Cases 1041, 1048 (N.D. Cal. 1973).

The Supreme Court reversed, with three justices dissenting, *Geduldig v. Aiello*, supra. Justice Stewart, writing for the majority, considered the legislative purposes and policies sought to be accomplished by the California disability insurance program, the risks involved, the costs of maintaining the program on a sustaining basis and the effects

of including pregnancy-related disabilities within its coverage. Relying on *Dandridge v. Williams*, 397 U.S. 471, 486-7 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972); and *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), he pointed out that the Equal Protection Clause does not require a state to attack every aspect of a problem at once, and that "particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point." *Aiello*, supra, 417 U.S. at 495, 8 FEP Cases at 101.

Justice Stewart found that the State had shown a legitimate interest in maintaining its insurance program on a self-supporting basis, in keeping benefit payments at an adequate level for covered disabilities and in maintaining the contribution rates at a level not unduly burdensome for participating employees.

Justice Stewart concluded that "these policies provide an objective and wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has," *Aiello*, supra, at 496, 8 FEP Cases at 101, and held that the exclusion of pregnancy-related disabilities from coverage under the California insurance program did not constitute invidious discrimination because of sex under the Equal Protection Clause.

Justice Brennan, writing for the dissent, was of the view that the California legislative classification was analogous to the legislative classifications held to be constitutionally invalid in *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 677 (1973). Justice Brennan reiterated the views he had expressed in *Frontiero*, supra, at 688, that classifications based on sex or gender "are inherently suspect and must therefore be subjected to strict judicial scrutiny." Justice Brennan also quoted his dissenting opinion in *Kahn v. Shevin*, 416 U.S. 351, 357-58 (1974) to the effect that "[t]he Court is not . . . free to

sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification, or by the use of feasible, less drastic means." *Aiello*, supra, at 503, 8 FEP Cases at 104. In Justice Brennan's view, California had failed to meet that burden and thus its exclusion of pregnancy-related disabilities violated the Equal Protection Clause.

Footnote 20 of the majority opinion,⁹ on which the district court below principally relied in holding that *Aiello*

⁹ The full text of footnote 20, at 496-7, 8 FEP Cases at 101-102, is as follows:

The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, supra, and *Frontiero*, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

required dismissal of the complaint in the case at bar, is in essence a refutation of the dissenting view as to the Equal Protection standards of judicial scrutiny applicable to the California legislative classification before the Court. It rejects the dissenting view that the California classification should be treated like the legislative classifications in *Reed*, *supra*, and *Frontiero*, *supra*. Stating that not "*every legislative classification* concerning pregnancy is a sex-based classification . . .", it goes on to say that "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, *lawmakers are constitutionally free* to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis. . . ." (Emphasis added.) Thus, footnote 20 deals with the constitutional validity of legislative classifications under the Equal Protection Clause, the standards of judicial scrutiny to be applied in making such a determination, and nothing more. Moreover, it does so in the context of the extensive record before the Court as to the operation and effects of the particular statutory insurance program it was considering and the considerations which led the California legislature to adopt it.

Nowhere, either in the body of the majority opinion in *Aiello* or in the footnote, is there any reference to the provisions of Title VII or the EEOC guidelines designed to prohibit the disparate treatment of pregnancy disabilities in the employment context. Under the guidelines, disabilities caused by pregnancy or childbirth are declared to be temporary disabilities for all job-related purposes, requiring employers to treat such disabilities on the same terms and conditions as other temporary disabilities are treated.¹⁰

¹⁰ As previously pointed out, p. —, 10 FEP Cases p. 436, *supra*, the allegations of sex discrimination in the complaint in the case at bar are based upon these guidelines.

The EEOC guidelines under Title VII are an administrative interpretation of the Act by the enforcing agency and are thus entitled to "great deference," *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175, 179 (1971). *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545, 3 FEP Cases 40, 42 (1971) (Marshall, J., concurring), unless their application would be inconsistent with an obvious Congressional intent. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94, 6 FEP Cases 933, 936 (1973).

If, as the district court below thought, *Aiello* was a definitive holding that, absent mere pretext, disparity of treatment of pregnancy-related disabilities could not constitute a violation of Title VII, *Aiello* would substantially circumscribe the reach of that Act of Congress and would invalidate the guidelines as to treatment of pregnancy disabilities issued by the EEOC. It is inconceivable that the majority opinion intended so to hold without even a mention of Title VII or the guidelines.¹¹

¹¹ It should be noted that only five months before *Aiello* was decided, Justice Stewart, in his majority opinion in *Cleveland Board of Education v. La Fleur*, 414 U.S. 632, 6 FEP Cases 1253 (1974), held that mandatory maternity leave policies for public school teachers of the Cleveland Board of Education violated the Due Process Clause of the Fourteenth Amendment. Title VII was not applicable to the cases before the Court in *La Fleur* since the maternity leaves at issue had occurred before Title VII was amended in 1972 to include state agencies and educational institutions. See Pub. L. 92-261, 86 Stat. 103. In n. 8, at 639, 6 FEP Cases at 1256, Justice Stewart referring to the 1972 amendment, expressly pointed out that

"Shortly thereafter, the Equal Employment Opportunity Commission promulgated guidelines providing that a mandatory leave or termination policy for pregnant women presumptively violates Title VII, 29 C.F.R. § 1604.10, 37 Fed. Reg. 6837. While the statutory amendments and the administrative regulations are, of course, inapplicable to the cases now before us, they will affect like suits in the future."

It can scarcely be thought that Justice Stewart in *Aiello* *sub silentio* invalidated the guidelines which he had said only five

Beyond this, the question in the case at bar as to the consequences of disparate treatment of pregnancy-related disabilities in the private employment context must be analyzed and decided in a framework quite different from that in which the question was decided in *Aiello*. Here the issue is one of statutory interpretation, not one of constitutional analysis as in *Aiello*.

Under the Commerce Clause, Congress plainly has the power to prohibit by statute various forms of discrimination in private employment which it deems would adversely affect the flow of interstate commerce. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).¹²

Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discriminatory practices forbidden by this statute should be limited to practices violative of the Equal Protection Clause. Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack.

Thus, the question to be decided in the case at bar is *not*, as in *Aiello*, whether exclusion of pregnancy-related disabilities from coverage violates the Equal Protection Clause. It is whether, as a matter of statutory interpretation, the practices complained of are forbidden by Title

months before in *La Fleur* would, in the future, affect suits involving pregnancy-related employment practices.

¹² This is in addition to the Congressional power under Section 5 of the Fourteenth Amendment to enforce, by appropriate legislation, the dictates of the Equal Protection Clause. That power may reach more broadly than the Equal Protection Clause itself. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *United States v. Guest*, 383 U.S. 745, 781-784 (1966) (Brennan J., concurring and dissenting). See also *Vineyard v. Hollister Elementary School District*, 64 F.R.D. 580, 585, 8 FEP Cases 1009 (N.D. Cal. 1974).

VII and the EEOC guidelines. We agree with the conclusion reached in the several recent well-reasoned cases dealing with the question of whether disparity of treatment between pregnancy-related and other disabilities in the employment context violates Title VII, that *Aiello* is not dispositive of that issue. *Wetzel v. Liberty Mutual Insurance Co.*, 9 FEP Cases 227, No. 74-1233 (3d Cir. February 11, 1975), affirming 372 F.Supp. 1146; 7 FEP Cases 34, 271 (W.D. Pa. 1974); *Vineyard v. Hollister Elementary School District*, 64 F.R.D. 580, 8 FEP Cases 1009 (N.D. Cal. 1974); *Sale v. Waverly-Shell Rock Board of Education*, 9 FEP Cases 138, No. C74-2029 (N.D. Iowa Jan. 8, 1975). See also *Union Free School District No. 6 v. New York State Human Rights Appeal Board*, 35 N.Y.2d 371, 362 N.Y.S.2d 139, 10 FEP Cases 431 (1974); *Farkas v. South Western City School District*, 506 F.2d 1400, 9 FEP Cases 240 (6th Cir. 1974) (affirming judgment of district court, 8 FEP Cases 288, that failure to pay teachers sick leave for absences relating to pregnancy constitutes discrimination on the basis of sex).

Finally, it should be noted that in the case at bar, in contrast to *Aiello*, only the bare allegations of the complaint couched in general language, largely taken from the statute and the guidelines, were before the district court. *Aiello* was decided on a full record in which the nature, details, operations and effect of the state insurance plan under attack and the reasons for its enactment were fully explored. The ultimate merits of the case at bar are not ripe for determination on such a record or at this stage of the proceedings.

What has been said thus far disposes of the narrow question presented on this appeal. That question is confined to the allegations of the complaint and the effect of *Aiello* thereon. We think it highly inadvisable, on an interlocutory appeal of this nature, to go beyond the bare limits of the question presented. In this state of the record it would

be unwise to discuss any questions which might arise during the further course of the action or to indicate any views which might bear on the ultimate merits. We expressly refrain from so doing.

We hold only that Aiello did not require the dismissal of the complaint as a matter of law for failure to state a claim on which relief could be granted under Title VII. Thus, the question posed on this appeal is answered in the negative. The order dismissing the complaint is therefore reversed and the action is remanded to the district court for appropriate proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at United States Courthouse in the City of New York on the twenty-sixth day of March one thousand nine hundred and seventy-five.

Present: HON. WILFRED FEINBERG

HON. WILLIAM H. MULLIGAN
Circuit Judges

HON. FREDERICK P. BRYAN
District Judge

74-2191

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; ESTHER SKIPPER, INDIVIDUALLY AND ON BEHALF OF ALL SIMILARLY SITUATED NON-SUPERVISORY FEMALE EMPLOYEES OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Plaintiffs-Appellants

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, LONG LINES DEPARTMENT,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded to said District Court for further pro-

ceedings consistent with the opinion of this court with costs to be taxed against the appellee.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN
Chief Deputy Clerk

SEP 3 1975

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1974

No. 74-1601

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT,
Petitioner,
v.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, ESTHER
SKIPPER, INDIVIDUALLY AND ON BEHALF OF ALL SIM-
ILARLY SITUATED NON-SUPERVISORY FEMALE EMPLOYEES
OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
LONG LINES DEPARTMENT,
Respondents.

**BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI**

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IN THE
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LONG LINES DEPARTMENT,
Respondents.

**BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI**

Preliminary Statement

Respondents COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO ("CWA"), and ESTHER SKIPPER ("Skipper"), submit this Brief in Opposition to the Petition for Certiorari filed by AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT ("A.T.&T.") on June 19, 1975, pursuant to the request of the Clerk of the United States Supreme Court dated August 4, 1975.¹ Respondents believe

¹ Respondents did not oppose the petition for certiorari at the outset in light of the granting of certiorari in *Liberty Mutual Insurance Company v. Wetzel, et al.*, Docket No. 74-1245, on May 27, 1975, 43 U.S.L.W. 3261, because a decision in that action could affect further proceedings in this case.

the decision and judgment of the United States Court of Appeals for the Second Circuit (13a-26a)² was, in all respects, correct and therefore the Petition should be denied. In the event the Court grants the petition, respondents urge that the judgment and opinion below be summarily affirmed. Respondents are aware that the identical question raised by the instant Petition is before the Court in *Liberty Mutual Insurance Company v. Wetzel* ("Wetzel" hereafter). If the Court grants the Petition without summary affirmation, respondents urge the Court to consolidate this proceeding with *Wetzel*. The broad impact of the challenged employment policies on the employment rights of women which are presented in this action may assist the Court in reaching its decision in *Wetzel*. Respondents are willing to consent to an accelerated briefing schedule in order to permit consolidated oral argument.

Proceedings and Opinions Below

Petitioner seeks review of an order of the United States Court of Appeals for the Second Circuit, entered March 26, 1975, reversing an order of *sua sponte* dismissal of respondents' class action³ complaint (A15) brought under Title VII of the Civil Rights Act of 1964, as amended, 42

² References to the Appendix furnished by Petitioner will appear in this form herein. References to the Joint Appendix on appeal to the Court below, certified to this Court by Respondents, pursuant to Supreme Court Rule 21, will appear herein by page number preceded by "A".

³ At the time of the District Court's decision, a motion for class action certification was *sub judice* (17a). Following the granting of certiorari in *Wetzel*, proceedings were suspended to await the Court's decision, and the motion is still undetermined. In a similar action, *Communications Workers of America v. New York Telephone et al.*, 73 Civ. 3352, (herein "Telco" action) plaintiffs' motion for class action certification was granted on July 11, 1974. 8 FEP Cases 509 (S.D.N.Y., 1974).

U.S.C. 2000e, *et seq.* ("Title VII" or "the Act"). The complaint challenged, as violative of the Act, petitioner's employment practices and policies which classify women disabled by pregnancy and childbirth differently from other employees under temporary disability. This classification involves the limitation or denial to women of a wide range of employment rights, including entitlement to income protection benefits under health insurance and disability benefits plans, commencement and duration of leave, availability of reinstatement, accrual of seniority, entitlement to vacations, pensions and promotional eligibility and other rights, benefits and privileges of employment at A.T.&T.

The District Court's opinion (1a-11a) was predicated upon a finding that this Court's decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974) ("*Aiello*"), holding that California's exclusion of disabilities relating to pregnancy⁴ from its state-administered disability insurance program for private employees did not violate the Equal Protection Clause of the Fourteenth Amendment, had determined that an employer's disparate treatment of pregnancy-related disabilities *cannot* constitute discrimination under Title

⁴ Due to an amendment in California's Unemployment Insurance Code, only the exclusion of disability for normal pregnancy was before the Court at the time of the *Aiello* decision. Although A.T.&T. purports to classify disabilities arising from complications of pregnancy as compensable disabilities, this is dependent upon whether the woman so disabled has previously been classified as on maternity leave (A61). Thus, a male employee absent from work due to a prostrate condition who, during his absence, suffers an attack of hypertension, receives appropriate protection for the second disability as well. A woman absent after being placed on maternity leave who suffers an attack of preeclampsia (a form of hypertension related to pregnancy) does not receive any protection for that complication. There is thus a factual issue regarding the extent to which A.T.&T. covers these disabilities, impliedly acknowledged in *Aiello* as required under Fourteenth Amendment standards, 417 U.S. at 489-490.

VII, absent a finding that it is a pretext designed to effect invidious discrimination against women.

The Second Circuit reversed, holding that *Aiello* was not decisive of issues arising under Title VII (20a), finding that statutory interpretation, rather than constitutional analysis, governed the efficacy of a complaint alleging discriminatory employment practices commenced under an Act of Congress "designed to prohibit a broad spectrum of discriminatory [employment] evils" under its Commerce Clause power (26a-27a).⁵ The Second Circuit further noted that the dismissal was inappropriate in the absence of a full record (27a).⁶ Following remand, the proceedings were suspended to await action by this Court in *Wetzel* and on pending petitions for certiorari in this case and in *General Electric Company v. Gilbert* (No. 74-1589) and *Gilbert v. General Electric Company* (No. 74-1590).⁷

⁵ The Court noted that the Guidelines issued by the Equal Employment Opportunity Commission ("EEOC") pursuant to Title VII, 29 C.F.R. § 1604.10, which require employers to treat pregnancy disability in the same manner as other temporary disabilities, were entitled to "great deference", forming part of the statutory interpretation which must be considered in considering whether these discriminatory employment practices violate the Act (25a-27a).

⁶ At the time of the District Court's dismissal, a substantial amount of pre-trial discovery had been conducted, although it was not completed (17a). Depositions had been taken in the *Telco* action (portions of which were referred to in the briefs and record before the District Court and the Court of Appeals, due to the substantial identity of the two challenged plans), but not in the instant case. The Court declined to examine the merits of the complaint in any further detail on an interlocutory appeal pursuant to 28 U.S.C. 1292(b) because of the limited state of the record (27a-28a).

⁷ These joint petitions for certiorari involve the same action, *Gilbert v. General Electric Co.*, 375 F. Supp. 367 (E.D. Va., 1974), *affd.* — F.2d —, 10 FEP Cases 1201 (4th Cir., 1975). References will be made to these decisions as "*Gilbert*."

Statement of Facts

Petitioner A.T.&T. is an operating department of American Telephone & Telegraph Company (A25) which controls the major portion of the United States' telephone communications system through more than twenty subsidiary companies (the Bell System) (A186-187). More than 10,000⁸ (A94, A142, A155) women are employed by Petitioner, of which approximately six percent are absent due to pregnancy during a one-year period (A59).

A.T.&T. provides disability benefits to its employees for absences which are due to inability to work. Benefits are embodied in a "Plan for Employees' Pension, Disability Benefits and Death Benefits" ("the Plan") and administered by a Benefits Committee (A85-A90). Any employee unable to work for more than seven consecutive days is entitled to the Plan's protection, regardless of the cause of the disability (A87-89, A296-297). Women disabled by normal pregnancy and childbirth are not excluded from benefits on the face of the Plan (A87-88), but through the administration by A.T.&T. of internal regulations and rules governing pregnancy (A68-74, A94-95, A98-100, A106-108, A112-115, A138-141, A145-147, A148, A151-154, A180-184, A280-283).

A disabled employee at A.T.&T. who is covered by the Plan receives extensive protection during the disability period. This protection extends beyond economic assistance in the form of income protection payments and insurance coverage for medical and/or hospital expenses, and includes protection of employment rights such as accrual of service credit (seniority) and wage progression credit.

⁸ Company statistics provided to CWA indicated that A.T.&T., as of July, 1975, employed 10,073 women and 14,864 men. Of the women, 3,289 are non-white.

Retention of service credit affects pension plan rights, permanent promotion eligibility, vacation entitlement, opportunities for transfer, susceptibility to lay-off or termination, and the amount of income protection benefits available for a covered disability (A75-79, A80-84, A86-90, A108-113, A280-282, A297).⁹ Wage progression credit affects an employee's eligibility for promotion and advancement and in-grade wage increases. These critical employment rights are extended to every disabled employee under Plan jurisdiction because A.T.&T. classifies such employees as "active" (A61, A89-90, A109, A154). Women disabled by pregnancy, however, are *not* classified as "active" employees. Rather than protect these disabled women under the Plan, A.T.&T. classifies pregnancy disability under its leave of absence policies (A68-74, A282-283) which do not afford any of these benefits and rights.¹⁰ They are thus denied employment benefits and rights extended automatically to every other disabled employee *regardless* of the reason for the inability to work.¹¹ The preservation of

⁹ Seniority even affects an employee's eligibility for inclusion in the Company's Upgrade and Transfer Plan, adopted pursuant to the Consent Decree entered into between EEOC and Bell System employers to correct some of its discriminatory practices against women and minorities (A116-117). See, e.g., *E.E.O.C. v. A.T.&T. Co.*, 365 F. Supp. 1105 (E.D. Pa., 1973) and A185-288.

¹⁰ A.T.&T.'s leave of absence policies do include a policy of making differential payments to employees (substantially all male) who are in military service, and extending other benefits, such as service credit to them (A63, A64, A66-67, A76, A105, A108, A109, A110, A151-152). Thus, even under the Company's leave practices women disabled by pregnancy do not receive equal treatment.

¹¹ The record below amply demonstrates that the Plan in effect for A.T.&T. is the same as that in effect for other Bell System employers (A121, A164), including New York Telephone Company, whose Medical Director testified at a deposition in the *Telco* action that "We have benefits which are paid for disabilities. . . .

these rights for all employees except women who, by reason of biology, become disabled by pregnancy, sets this case factually apart from *Aiello*, as well as *Wetzel* and *Gilbert*, and demonstrates the broad spectrum of employment rights which are denied or limited for women alone under A.T.&T.'s policies and practices.¹²

CWA is the collective bargaining representative of all non-supervisory employees at A.T.&T., as well as other companies within the Bell System. Beginning in 1971, CWA sought negotiations with A.T.&T. to correct this discriminatory treatment of women disabled by pregnancy (A49-50; cf. A84). Following this unsuccessful effort, CWA filed its Charge of Discrimination with the EEOC in April, 1972 (A48). Mrs. Skipper has been an employee of A.T.&T. since December, 1970. She was disabled due to her pregnancy and birth of a daughter in 1972. She was denied all of the employment rights discussed above. After satisfying the jurisdictional requirements of the Act (A24), this action was commenced in July, 1973.

If you are disabled, no matter what the cause . . . you are entitled to benefits, and so you can do down any list you want [of causes of disability] and the answer is going to be yes to any condition which produces a disability, not because of the condition because that's irrelevant, but because the impairment is sufficient to prevent the employee from doing useful work." (A166-167) (emphasis added)

¹² The *Wetzel* case involves a disability insurance program subscribed to by all employees of Liberty Mutual Insurance Company and partially supported by their mandatory contributions, as well as mandatory discharge policies applied to women on leave due to pregnancy disability. The *Gilbert* case involves General Electric's failure to pay sickness and accident benefits to women disabled by pregnancy. This plan is employer-funded. Neither case involves the sweeping loss of other employment rights presented here, although these additional rights are central to an employee's relationship to any employer and must be considered in any decision governing employment rights guaranteed by Title VII.

ARGUMENT

I.

The Petition Should Be Denied.

Respondents respectfully suggest that granting of certiorari in this case is not appropriate. Although the question presented does raise an issue of importance in the administration of Title VII's ban on sex discrimination in employment, there is no uncertainty regarding an employer's obligations under that Act to provide equal benefits to all employees without regard to factors inextricably linked to their membership in a class protected by Title VII.¹³ Nor is there any conflict in principle between the decision below and this Court's decision in *Aiello*.

At the time of entry of the decision and order below, the question presented in this Petition had been decided affirmatively by a significant number of federal courts. See, e.g., *Wetzel v. Liberty Mutual Insurance Company*, 508 F. 2d 239 (3rd Cir., 1975), *affirming* 372 F. Supp. 1146

¹³ Respondents are aware of the contentions made by the petitioner in *Wetzel*, as well as the Bell System and other *amici curiae* in that case supporting the employer's position, that women often account for a greater percentage of disability benefits afforded than men. There is no evidence in the case at bar bearing upon the accuracy of this position. Moreover, this is not the point of the Act. Employers are precluded from considering sex, like race, as a factor in the granting or denial of employment rights. The fact that biased employment decisions save money does not change the fact that they discriminate against protected groups. The cost of equal treatment in the economic marketplace for purposes of Title VII should be as irrelevant as it is in other areas of the law. Cf. *Swann v. Charlotte-Mecklenburg Board of Education*, 306 F.Supp. 1299, 1312 (W.D.N.C. 1969); *Goss v. Board of Education of City of Knoxville, Tenn.*, 482 F.2d 1044, 1046 (6th Cir. 1973), *cert. den.* 414 U.S. 1171 (1974); *Cato v. Parham*, 297 F.Supp. 403, 411 (E.D.Ark. 1969).

(W.D. Pa., 1974); *Vineyard v. Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal., 1974); *Sale v. Waverly-Shell Rock Board of Education*, 9 FEP Cases 138 (N.D. Iowa, 1975) *leave to appeal den.* — F. 2d —, (8th Cir., Jan. 31, 1975, Misc. No. 75-8088); *Farkas v. South Western City School District*, 506 F. 2d 1400 (6th Cir., 1974), *affirming* 8 FEP Cases 288 (S.D. Ohio, 1974); *Satty v. Nashville Gas Company*, 384 F. Supp. 765 (E.D. Tenn., 1975); *Gilbert v. General Electric Co.*, 375 F. Supp. 367 (E.D. Va., 1974).

In addition, the New York Court of Appeals, in a unanimous decision, held that the answer to the question presented here was affirmative in relationship to the New York State Human Rights Law (Executive Law §297, *et seq.*), the State enactment comparable to Title VII in its proscription of employment discrimination on the basis of sex. *Union Free School Dist. No. 6 v. New York State Human Rights Appeal Board*, 35 N.Y. 2d 371 (1974). In holding interpretations of sex-based classifications under Fourteenth Amendment standards irrelevant to their validity under the statutory proscriptions of the Human Rights Law, 35 N.Y. 2d at 376-378, the Court looked at the "direct and positive focus" of legislative enactments forbidding discrimination in employment and found that an employer's personnel policies which treat pregnancy and childbirth disabilities differently from other disabilities for purposes of compensation and reinstatement discriminated on the basis of sex in violation of the law of New York. Taking special note of the *Aiello* decision and of the district court's dismissal herein, the Court declared that

"were the Supreme Court to declare that exclusion of pregnancy and maternity benefits was to no extent based on sex, we would not be obliged to accept such

determination for the purposes of the application of our State's Human Rights Law. (35 N.Y. 2d at 377, n. 1)

In contrast to the assertion by Petitioner that "uncertainty now abounds" as to whether an employer who differentiates between disability arising from pregnancy and other temporary disabilities in a benefits program discriminates in Title VII terms (Petition, pp. 4-5), these court decisions are unanimous in finding that such discrimination exists. This unanimity was made even clearer following the issuance of the decision below by additional district and circuit court decisions finding employment policies involving disparate treatment of women disabled by pregnancy to be prohibited sex discrimination under the Act. See, e.g., *Gilbert v. General Electric Co.*, — F.2d —, 10 FEP Cases 1201 (4th Cir. June 27, 1975); *Satty v. Nashville Gas Company*, — F.2d —, 11 FEP Cases 1 (6th Cir. August 8, 1975); *Zichy v. City of Philadelphia*, 392 F.Supp. 338, (E.D. Pa. 1975); *Holthaus v. Compton & Sons, Inc.*, 514 F.2d 651 (8th Cir. April 10, 1975).¹⁴ The

¹⁴ In addition, numerous cases have determined that disabilities caused by pregnancy or childbirth must be treated by employers the same as all other disabilities or be in violation of state fair employment practices statutes or of constitutional guarantees. See, e.g., *Dessenberg v. American Metal Forming Co.*, 8 FEP Cases 290 (N.D. Ohio 1973); *Black v. School Committee of Malden*, 8 FEP Cases 132 (Mass. Sup. Jud. Ct. 1974); *Cedar Rapids School Dist. v. Parr*, 6 FEP Cases 101 (D. Iowa 1973); *Hanson v. Hutt*, 83 Wash.2d 195, 517 P.2d 599 (Sup. Ct. Wash. 1973); *Lillo v. Plymouth Board of Education*, 8 FEP Cases 21 (N.D. Ohio 1973); *Scott v. Opelika City Schools*, 63 F.R.D. 144 (M.D. Ala. 1974); *Drake v. Covington Board of Education*, 371 F.Supp. 974 (M.D. Ala. 1974). The Ninth Circuit Court of Appeals recently affirmed the decision of the District Court of Oregon in *Hutchison v. Lake Oswego School Dist.*, 374 F.Supp. 1056 (D. Ore. 1974), *aff'd.*, July 21, 1975, Nos. 74-3181, 3182), noting specifically that, while *Aiello* might govern Fourteenth Amendment claims regarding an employer's refusal to permit a teacher to apply accumulated sick

decision below is thus in accord with those of five other circuits (Third, Fourth, Sixth, Eighth and Ninth), and no conflict exists among the circuits regarding the Title VII violation occasioned by an employer's failure to treat women disabled by pregnancy in the same manner as other disabled employees.

Respondents urge that these decisions present no conflict with this Court's decision in *Aiello* for the reasons set forth therein and in the persuasive opinion of the Court below. The Congressional ban on employment discrimination contained in Title VII expresses precisely the kind of legislative judgment regarding discriminatory classifications based upon sex which this Court in *Aiello* recognized as appropriate and permissible.¹⁵ Title VII's broad scope has been repeatedly recognized and approved by the courts in the area of discrimination in fringe benefits, as well as in the cases cited above which have specifically addressed the disparate treatment of women disabled by pregnancy. See, generally, *Rogers v. Equal Employment Opportunity Commission*, 454 F. 2d 234, 238 (5th Cir., 1971), *cert. den.* 406 U.S. 957 (1972); *Sprogis v. United Airlines*, 444 F. 2d 1194 (7th Cir., 1971), *cert. den.* 404 U.S. 991 (1971); *Rosen v. Public Service Electric & Gas Co.*, 477 F. 2d 90 (3d Cir., 1973).

leave to childbirth-caused incapacity, it did not govern her Title VII claim of sex discrimination. The court affirmed the lower court's determination that such disparate treatment was in violation of EEOC Guidelines and Title VII.

¹⁵ In footnote 20 the Court declared that "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis." 417 U.S. at 494 (emphasis added). Legislation directed at eradicating the evils of employment discrimination in all of its forms, including the discriminatory limitation or denial of rights, benefits and privileges of employment to a sizeable group of women, is obviously excluded from the factual scope of the *Aiello* decision.

As the Court below recognized, a definitive finding in *Aiello* that disparity of treatment of pregnancy-related disabilities could not violate Title VII (absent pretext), "would substantially circumscribe the reach of that Act of Congress and would invalidate the guidelines as to treatment of pregnancy disabilities issued by the EEOC" (25a).

The issues raised by a Title VII challenge to employment policies which limit the rights of women disabled by pregnancy are completely different from those raised in the Fourteenth Amendment context of *Aiello*. The courts which have considered *Aiello's* impact on Title VII have all agreed with the Court below that the differing jurisdiction and scope of the Act require the application of separate standards for measuring prohibited conduct. Petitioner is incorrect in its assumption that this Court's Fourteenth Amendment conclusion in *Aiello* applies to Title VII, or any legislative enactment governing equal employment opportunity. *Union Free School District No. 6 v. Human Rights Appeal Board, supra*, 35 N.Y. 2d at 377-378.

The factual matters raised in the instant case and their impact upon women extend far beyond those involved in *Aiello*. This Court's determination that California could secure the purposes of its insurance program in the manner selected without violating the Fourteenth Amendment did not affect the *employment* rights of California women disabled by pregnancy. While they were denied financial assistance, California women did not face the multitude of problems encountered by A.T.&T.'s women who are so disabled. They did not lose their job seniority, or pension entitlement or promotional opportunity. In short, the employment status of California's working women was not adversely affected by their inability to obtain insurance payments under the State's Fund. It is this effect upon

employment rights which brings Title VII into play, and which supports the distinction drawn by the court below, and the other circuit and district court decisions which have found *Aiello* to be inapplicable to the question presented here.

A significant number of other factual differences exist between A.T.&T.'s Plan and California unemployment insurance program. Employees do not contribute to the Plan; monetary payments are provided to disabled employees as a *benefit* of their employment by A.T.&T.¹⁶ A.T.&T., like other employers, seeks and obtains advantages from providing fringe benefits to its employees. It attracts people of the competency and permanence it desires by offering such benefits. A state enacting a social welfare program, on the other hand, does not hope to attract program recipients or continue their relationship to it. Thus, a state's social welfare objectives are framed as a result of need to exercise its police powers to provide public assistance in areas which cannot be privately handled. By contrast, an employer intends to and does serve purely personal (and profitable) ends in framing employee benefit programs.¹⁷

¹⁶ A.T.&T. protects its disabled employees through payments and corresponding employment benefits which vary during each fiscal year according to the number of employees disabled during that year (A89). A.T.&T. does not use an outside insurer to cover these costs (except with regard to supplemental group life insurance not relevant here) but considers them operating expenses. See *Moody's Public Utility Manual* (Moody's Investor Service, Inc., 1974 ed.), p. 992. Accordingly, it reaps certain tax advantages. In addition, A.T.&T.'s costs must be measured against the finding made by the EEOC during proceedings leading to the Consent Decree that discrimination by the Bell System against women alone result in a saving to it of \$500 million per year (A286).

¹⁷ For example, New York, in establishing a welfare program to aid needy families, does not thereby wish to encourage needy

The assertion that no distinctions exist between this case and *Wetzel* (Petition, p. 6), is also incorrect, insofar as the *Wetzel* petition is limited to issues revolving solely around the Company's failure to make disability income protection payments to women disabled by pregnancy and discharge policies and does not involve the other aspects of employment rights denied to disabled women at A.T.&T.

II.

In the Event the Petition Is Granted, the Order and Judgment Below Should Be Summarily Affirmed.

Respondents respectfully suggest, in the event the Court grants the Petition here, that the order and judgment below should be summarily affirmed. Summary affirmance is particularly appropriate where the record is not fully developed and where the decision on which the writ is sought was issued on a certified question.¹⁸

In contrast to *Wetzel*, respondents here have not been able to fully develop their case through pre-trial discovery and do not have the benefit of a full presentation of petitioner's position on the defenses asserted.¹⁹ Absent the

families to move to the State to obtain welfare benefits. A.T.&T. wishes to encourage employees to work for it because they know they will obtain desirable fringe benefits as part of their compensation.

¹⁸ As noted in Point I, the question certified has been resolved unanimously in respondents' favor by every district court and court of appeals which has addressed it. See cases cited at pp. 8-10.

¹⁹ These defenses include the assertion that the challenged policies are "based upon a rational and neutral business justification" under Title VII (17a). Title VII contains no such defense. Court decisions have, however, developed a test of "business necessity" in assessing employment policies claimed to be discriminatory. See, e.g., *U.S. v. Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir., 1971).

"nature, details, operations and effect" of A.T.&T.'s policies regarding women disabled by pregnancy, and a full exploration of the "reasons for [their] enactment" (27a), the ultimate merits of respondents' claim should not be adversely determined. Summary affirmance will acknowledge the absence of any conflict with previous decisions on this issue and permit the development of the full record necessary for determining the applicability of Title VII's proscription against sex discrimination to the challenged policies here.

III.

In the Event the Petition Is Granted, and Not Summarily Affirmed, This Case Should Be Consolidated With *Wetzel* and Determined On the Merits.

In the event the Court grants the Petition but declines to summarily affirm, respondents believe that the critical facts involved in this action should be before the Court when it determines the question presented in *Wetzel*. Accordingly, respondents would consent to an order consolidating this proceeding with that in *Wetzel*, scheduling oral argument at the same time, and would agree to an expedited briefing schedule to accommodate such action and eliminate any delay in deciding the issue.²⁰

Respondents respectfully suggest that, in answering the question presented here and in *Wetzel*,²¹ the Court has the

²⁰ Because of the district court's dismissal here and subsequent appeal, and the suspension of proceedings to await this Court's determination of *Wetzel*, more than a year has passed since any discovery or trial preparation occurred. A speedy resolution is obviously appropriate, both from the standpoint of judicial efficiency and to implement the mandate of Title VII. See, e.g., 42 U.S.C. §2000e-5(f).

²¹ The same question is also presented in *Gilbert*, although certain subsidiary questions were also presented by both sides.

opportunity to consider, on the merits, the broad impact its answer will have upon protected employment rights. The affected employment status of women at A.T.&T., like those in other employment settings, provides a clear guide to the impact of these challenged policies upon full and equal access to the job market for all women. Any decision in *Wetzel* must be made with adequate guidance as to the full ramifications of employer policies which treat women disabled by pregnancy and childbirth in a disparate and disadvantageous manner from all other disabled employees.

The growing number of decisions discussed in Point I, *supra*, addressing challenged employment policies involving pregnancy and childbirth demonstrate the widespread use by employers of women's childbearing function as the excuse for limiting their employment rights and opportunities. These decisions demonstrate that the manner of disparate treatment may vary from employer to employer.²² A.T.&T.'s policies, however, have the broadest impact, and should be before the Court in answering the Question Presented.

²² In *Holthaus v. Compton & Sons, Inc.*, *supra*, the employer had no disability plan. However, employees who became disabled were permitted to use accrued vacation time during their absence, and thereafter take leave without pay. Mrs. Holthaus, however, was discharged when she suffered a pregnancy-related disability. In *Satty v. Nashville Gas Co.*, *supra*, women disabled by pregnancy were denied the opportunity to apply accrued sick leave to their absence. Further they lost their accumulated seniority for job bidding purposes following recovery. Men disabled, regardless of the cause, were not denied these opportunities. Both of these decisions relied upon EEOC Guidelines, 29 C.F.R. §1604.9(b) and §1604.10(b) making it a *prima facie* violation of Title VII to discriminate with regard to employment fringe benefits because of sex or because of disability due to pregnancy or childbirth.

CONCLUSION

Respondents respectfully request that the Petition for a Writ of Certiorari be denied, but that, if it is granted, the decision and order below be summarily affirmed or, in the alternative, that the Court order this case consolidated, for argument and determination, with *Liberty Mutual Insurance Co. v. Wetzel*.

Respectfully submitted,

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